

DATE ISSUED: August 1, 1996

CASE NO. 94-INA-517

In the Matter of:

JERRY'S,
Employer

on behalf of

CARLOS ALBERTO CASTILLO SANDOVAL,
Alien

Appearance: Samuel G. Kooritzky, Esq., Arlington, VA
For the Employer and the Alien

Before: Huddleston, Vittone, and Wood, Administrative Law Judges

PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of the Alien, Carlos Alberto Castillo Sandoval ("Alien"), filed by Employer, Jerry's ("Employer"), pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, Philadelphia, PA, denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

Under section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ aliens on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing wage conditions through the public employment service

and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied the application for certification and the employer's request for review, as contained in the appeal file ("AF"), as well as any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On May 27, 1993, as amended, the Employer filed an application for labor certification to enable the Alien, a national of Nicaragua, to fill the position of "Shift Supervisor" (AF 72). The job duties for the position in question were described by the Employer, as follows: "SUPERVISOR [*sic*] A CREW OF RESTAURANT EMPLOYEES DURING EVENING SHIFT TO ASSURE PROPER FOOD PREPARATION, CLEANLINESS OF FACILITY, PROPER TREATMENT OF CUSTOMER, AND EFFICIENT ASSIGNMENT OF EMPLOYEES." (AF 72). The stated job requirements for the position, as set forth on the amended application, were 2 years of experience in the related occupation of "SUPERVISION", as well as the special requirements of willingness to work Saturday and Sunday and experience in commercial food preparation. (AF 72).

In a Notice of Findings ("NOF") dated March 3, 1994, the CO proposed to deny certification for the following reasons: (1) the wage offer of \$9.00 per hour was below the prevailing wage of \$9.68 per hour, in violation of 20 C.F.R. §§ 656.20(c)(2), 656.20(g)¹ and 656.21(g)(4) ["adverse effect"]; and (2) the requirement of two years of experience for a Manager, Fast Food Services, exceeds the 6 months to 1 year normal experience requirements for the position set forth in the **Dictionary of Occupational Titles** ("DOT"), in violation of 20 C.F.R. § 656.21(b)(2) ["unduly restrictive job requirements"]. The Employer was given the opportunity to submit rebuttal or to readvertise with the higher wage and without the restrictive requirements. (AF 45-48).

The Employer's rebuttal to the Notice of Findings consisted of a letter, dated March 31, 1994, from its attorney (AF 35-36), and copies of sections of the **Dictionary of Occupational Titles** relating to various types of supervisory positions relating to food service and restaurants (AF 41-44). A copy of a Jerry's Subs/Pizza Colesville Center menu already was included in the file, which included a listing of hot and cold submarine sandwiches, various types of pizza, cheesesteaks, side orders (potato fries, pizza slices, salads, chips), and beverages.

¹ It is unclear why this subsection was cited.

(AF 66-67). The Employer's attorney agreed with the CO that the wrong code, for Food Service Supervisor (Occupational Code 319.137-010) had been used by the state agency but disagreed that the position was accurately classified as Manager, Fast Food Services (Occupational Code 185.137-010), maintaining that due to the variety of foods offered the appropriate classification was as Restaurant Manager under Occupational Code 187.167-106 (denoted as Manager, Food Service under the DOT). He noted that if the new classification were correct it might resolve both issues raised by the CO, and he did not otherwise seek to either justify the prevailing wage and establish business necessity for the experience requirement or offer to readvertise. (AF 35).

The CO found the rebuttal unpersuasive and issued a Final Determination on May 10, 1994, denying certification on the above grounds (AF 32-34). Subsequently, the Employer filed a request for review of the Final Determination on June 13, 1994 along with additional information, including a "Late Night" menu. (AF 1-31).

DISCUSSION

As a preliminary matter, we will not consider the material submitted by the Employer in connection with the request for review. Our review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. § 656.27(c). **See also** 20 C.F.R. § 656.26(b)(4). Here, the Employer has failed to assert a basis for not having submitted the subject documentation as part of its rebuttal and it should not be considered now. **See Sharp Screen Supply, Inc.**, 94-INA-214 (May 25, 1995); **ST Systems, Inc.**, 92-INA-279 (Sept. 2, 1993); **Schroeder Brothers Co.**, 91-INA-324 (Aug. 26, 1992); **Kem Medical Products Corp.**, 91-INA-196 (June 30, 1992).

In the instant case, as stated in the Notice of Findings, the CO found the two-year experience requirement to be unduly restrictive, because it exceeds the normal D.O.T. requirements for the position of Manager, Fast Food. Accordingly, the CO directed the Employer to either establish the business necessity for the requirement or reduce/delete the requirement and readvertise (AF 45-48). Instead, the Employer chose to present argument which it apparently thought might convince the CO that the position offered is not that of a "Manager, Fast Food" under Occupational Code 185.137-010, but rather "Manager, Food Service" (the title used for a restaurant manager), as provided in Occupational Code 187.167-106. While the Specific Vocational Preparation (SVP) for the former is "5", which translates to 6 months up to and including 1 year, the latter position lists an SVP of "7", or over 2 years up to and including 4 years of experience and/or vocational training. Accordingly, if the Employer had submitted convincing rebuttal evidence which would

have established that the position in question was actually that of a "Manager, Food Service," the two-year experience requirement would have been consistent with the SVP. In the Final Determination, however, the CO reiterated his prior finding, and, again, stated that the position in question is much more consistent with that of a Manager, Fast Food rather than a Manager, Food Services.

Having carefully reviewed the relevant descriptions, as set forth in the D.O.T., we agree with the CO's conclusion that due to the limited menu and the nature of the food offered, Jerry's is more accurately characterized as a Fast Food establishment and the correct occupational code is that of Manager, Fast Food. The food offered by the Employer is confined to hot and cold sandwiches, pizza, and accompaniments, all of which involve limited preparation time. In this regard, the case is similar to **Hardee's**, 94-INA-218 (June 27, 1995), in which we found a similar menu to constitute fast food, because the foods listed involved minimal preparation time, and we found the position concerned there to be appropriately classified as "Cook, Fast Food." For similar reasons, we find the position concerned here to be more appropriately classified as "Manager, Fast Food."

Accordingly, we find that certification was properly denied by the Certifying Officer, and it is unnecessary to address the remaining issues.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

PAMELA L. WOOD
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten (10) days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

SERVICE SHEET

Case Name: Jerry's (Carlos Alberto Castillo Sandoval, alien)

Case No. : 94-INA-517

Title : Decision and Order

I hereby certify that on the date issued the above-named document was mailed to the last known address of each of the following parties and their representatives:

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Gloria Foster
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BALCA VOTE SHEET

Case Name: Jerry's (Carlos Alberto Castillo Sandoval, alien)

Case No. : 94-INA-517

PLEASE INITIAL THE APPROPRIATE BOX.

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	:	CONCUR	:	DISSENT	:	COMMENT	:
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Vittone	:	:	:	:	:	:	:
	:	:	:	:	:	:	:
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Huddleston	:	:	:	:	:	:	:
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Thank you,

Judge Wood

Date: